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No. 418

IN THE

Supreme Court of the United States

October Term, 1948

EDWARD GIBBS,

Petitioner

v.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA

On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF CONTRA PETITIONER

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Jurisdiction

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BRIEF CONTRA PETITIONER

BRIEF OF COMMONWEALTH OF PENNSYLVANIA, DISTRICT ATTORNEY'S OFFICE, DELAWARE COUNTY

JURISDICTION

The record involves no jurisdictional questions. It is conceded that the matter is properly before this court for determination.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Section 1 of the Fourteenth Amendment provides in pertinent part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Article I, Section 9, of the Constitution of Pennsylvania provides:

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel * * *."

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Where a mature man, thirty-four years of age, with prior encounters with the criminal law which crystalized into a long criminal record of six separate felonies, is charged in the commission of his seventh felony, and thereupon appears in a State Court without the assistance of counsel, but actively engages in the trial of the case as counsel could have done, was it a denial of "due process" for the State Court not to have appointed counsel to represent him?

2. Where the record is barren of any averment in the pleadings that the accused was indigent, will the Court make such a finding merely because it is stated in counsel's brief?

3. Where the record is devoid of any request by an accused, charged in a State Court with having committed his seventh felony, that the Court appoint counsel to defend him, and the accused participates actively in the trial of his case, has he not waived his right to complain that he was not represented by counsel?

4. Was this defendant accorded a fair hearing?

COUNTER-STATEMENT OF THE CASE

On September 30, 1947, the petitioner, Edward Gibbs, was called to plead in the Court of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace in and for the County of Delaware, Commonwealth of Pennsylvania, to a single bill of indictment charging him with having committed the offense of Larceny, a felony, and Receiving Stolen Goods. A plea of not guilty was entered and the case proceeded to trial. The facts proven against the accused were in brief, that he had called at the home of one James Blades, on the morning of July 17th, 1947, that thereafter certain property of Blades was found missing, viz, a radio, two flashlights, a pin-striped coat, a blue serge suit, seamans papers, a camera, a wrist watch and hat; later the same day the accused was arrested, found wearing part of the clothing; the hat, the wrist watch, other of the goods, the camera, radio and suitcase containing the clothes were pawned and the accused identified as having pawned them and the balance were found in the cell occupied by him. The accused alleges that he was denied counsel. The record of the trial is devoid of any such request having been made. After conviction by a jury, the learned Trial Judge, reviewed the accused's prior criminal record and proceeded to impose sentence. No appeal was

taken from his conviction nor exceptions of any character taken as to the conduct of the trial. The prisoner now alleges that his trial, without benefit of counsel, is under the circumstances surrounding the trial, a violation of the requirements of "due process of law", and a denial of his Constitutional Rights.

Following an unsuccessful application to the Supreme Court of Pennsylvania for a writ of habeas corpus, the matter is now before the Supreme Court of the United States, on a writ of certiorari.

ARGUMENT

Owing to the very short period of time between the receipt of notice that the above entitled matter was to be heard on argument, April 20th, 1949, and the receipt of printed brief of petitioner's counsel, on April 8th, 1949, it has been impossible to examine in detail the decisions which will finally determine the issues before the court. Therefore, of necessity, this brief must be at best limited in scope and research.

The guilt of this petitioner of the crime of Larceny is beyond question and not in issue. The issue now to be determined is whether he was properly charged with the offense, tried, convicted and sentenced, under the laws of the Commonwealth of Pennsylvania and the Constitution of the United States, more particularly the portion of the Fourteenth Amendment which is as follows:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

Under the laws of the Commonwealth of Pennsylvania, it is only in capital cases that a court must ap-

point counsel to represent an accused at the time of his trial. Such has been the law of this Commonwealth, for over two centuries. By the Act of May 31st, 1718, 1 Sm. L. 105, sec 4, 19 Purdon Statutes, par. 783, it was required that "learned counsel" be assigned to the prisoners "upon all trials" of "capital crimes". This is also provided for in the Acts of March 22nd, 1907, P. L. 31, sec 1, 19 Purdon Statutes, par. 784. Hence, unless the appointment of counsel is mandatory as an absolute requirement under the Fourteenth Amendment to the Federal Constitution, none need have been appointed, even if requested by the accused when charged with Larceny only.

With the exception of trials of cases involving capital offenses, it has never been held that the failure of a court in the Commonwealth of Pennsylvania to appoint counsel to assist an accused at the time of trial is a denial of due process of law. *Com. ex rel. McGlinn v. Smith* (1942) 344 Pa. 34. The report of this case contains a full, comprehensive and historical review of the identical issue here presented. To what has been so lucidly expressed there is nothing to be added and as a guide in the presentation of cases of a similar character before the courts of initial jurisdiction likewise there is needed no additional instructions. On this phase of the issue the record conforms to the requirements therein set forth. Even taking into account the reasons relied upon by the Supreme Court of the United States, in *Uveges v. Com. of Pa.*, 69 S. Ct. 184

(1948), in reversing the Supreme Court of Pennsylvania, the basic facts of that case and the present case are very much different. The principal factor in the Uveges case was the youth of the accused; the alleged threats of dire consequences by the Assistant District Attorney if he dared to stand trial, that there would be a sentence to the Huntington Reformatory. Not one of these factors is present in the record of this case. The only thing that is presented, and this alone is alleged as the basis for complaint, viz, that the court did not appoint counsel to participate in the trial of the case on behalf of the accused.

As pointed out in the opinion of this Court, in *Uveges v. Com. of Pa.* (supra):

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See Bute v. People of Illinois, 333 U. S. 640, etc. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady, 316 U. S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595. Where the gravity of the crime and other factors—

such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.

"The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial. The application of the rule varies as indicated in the preceding paragraph.

"Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an advisor to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which

carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing."

"Reversed."

Counsel for petitioner have cited four cases involving claims of denial of the right to counsel in circumstances alleged to violate the guaranty of Due Process of Law of the Fourteenth Amendment and which went to trial, viz, *Powell v. Alabama*, 287 U. S. 45; *Betts v. Brady*, 316 U. S. 455; *Hawk v. Olson*, 326 U. S. 271; and *Wade v. Mayo*, 334 U. S. 672. These cases are easily distinguishable on their facts. In *Powell vs. Alabama*, a capital offense was involved, a hurried trial without investigation was had, and no opportunity to investigate was granted; the trial was conducted in a hostile atmosphere; the accused had no opportunity to employ counsel; there was no reasonable opportunity to defend the case; the crime was committed on March 25th, 1931 and the indictment was returned in the State Court on March 31st, and on the same date the defendants were arraigned and entered

pleas of not guilty. As will be pointed out later not one of those facts are present in this case.

In *Betts v. Brady* (supra), the accused was charged in the State of Maryland with the offense of robbery, and as an indigent requested the Court to appoint counsel for him. The practice there, as in Pennsylvania, is to appoint counsel in such cases only where a capital offense is involved, i. e., murder and rape. There, as here, the accused cross examined the State's witnesses. He was afforded, as here, an opportunity to take the witness stand and to examine his own witnesses. This Court upheld the denial of the writ of habeas corpus and affirmed the action of the Court of Appeals of Maryland which had denied, as here, the relief sought under such writ. A careful reading of this case would seem to determine the issue now presented to this Court for decision, and require a dismissal of the petition.

In the matter of *Hawk v. Olson*, 66 S. Ct. 116 (1945), the accused was charged with the crime of murder in the State of Nebraska. The petitioner alleged that his conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and the Trial Court. This averment was not denied. He also alleged that on March 16, 1936, he was brought to Omaha from the Federal Penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening by the Public Defender and his

Assistant. Those officials tried to intimidate the petitioner to plead guilty. He refused to do so, and the two officials left the petitioner and said they would have nothing to do with the Petitioner's trial scheduled for the following morning. The next day petitioner was arraigned and was read the information charging the murder to which he pleaded not guilty, and forthwith requested a continuance of twenty-four hours for the purpose of consulting counsel, examining the charge, subpoenaing witnesses and preparing a defense. The motion for a continuance was overruled and the case ordered to proceed to trial, and after two or three jurymen were called, a Public Defender and his Assistant stepped forward and entered the case, without ever having consulted the petitioner, and without ever having been assigned by the Trial Court to represent the accused. The case continued on the trial to the following morning, March 18th, 1936. These facts, the Court held, if true, violated the requirements of "Due Process" under the Fourteenth Amendment, and remanded the case for further proceedings. Not one single fact appearing in the *Hawk v. Olson* case is present here.

In *Wade v. Mayo* (supra), the facts were as follows: The accused was arrested on February 19, 1945, and charged with breaking and entering in Palm Beach County, Florida. He was held in jail until trial on March 14, 1945. At time of trial he requested the trial judge to appoint counsel alleging he was unable to employ one himself. The request was refused. The

jury convicted him on the same day and he was forthwith sentenced. One year later he filed a petition in the U. S. District Court for the Southern District of Florida alleging a refusal to appoint counsel for him at the trial was a deprivation of his constitutional right of due process of law. The accused was eighteen years of age, with a prior criminal record and familiar to some extent with Court procedure. The District Court determined the youth was inexperienced and incapable of adequately representing himself in a trial with no complicated legal questions. The court there stated (p. 684-5):

> "There are some individuals, who, *by reason of age, ignorance or mental capacity are incapable of representing themselves in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment. The Circuit Court of Appeals was therefore in error in reversing the District Court's judgment. It was also in error in assuming that the failure to appoint counsel in a non capital case in a state court is a denial of due process under the Fourteenth Amendment only if the law of the State requires such an appointment. To the extent that there is a constitutional right to counsel in this type of case it stems directly from the Fourteenth Amendment and not*

from State Statutes. Betts v. Brady, 316 U. S. 455. *Reversed.*"

We thus have four cases which directly raise the issues here presented on the question of "Due Process" under the Fourteenth Amendment. This defendant, thirty-seven years of age, with six prior pleas of guilty or convictions of felonies, arrested on July 17, 1947, held in jail on the charge of Larceny and Receiving Stolen Goods, until the time of his trial on September 30th, 1947, called for trial, and insofar as the record discloses never requested the appointment of counsel, neither asked for time to prepare his defense, if any he had, and at no time requested before being called for trial the subpoena of witnesses to aid him in presentation of a defense. In fact the petition is barren of any facts which would indicate he had any defense at all. In view of the record he had no defense, except that which was to be inferred from his questions to the victim, viz, that the latter had asked him to dispose of the goods, and to this it affirmatively appears that such was not the case at all. The petitioner has not alleged he was of tender years and the record itself shows he understood the nature of the offense and what he was called upon to answer. It required no searching of his conscience to determine his innocence or guilt. This was not a hurried trial. The petitioner knew from the date he was arrested, the same date on which the goods were stolen and on which he was apprehended with part of the stolen goods remaining in his possession, and identified immediately thereafter as the person who

had pawned the balance under an assumed name. His only basis of complaint is that under the circumstances he required the services of a lawyer to defend him and see that the requirements of "Due Process" were followed. Just what could even an able trial lawyer do for such a defendant? This defendant does not even allege that he was of tender years, ignorant or lacking in mental capacity. The circumstances of the case of *Powell v. Alabama* are entirely lacking. The case of *Betts v. Brady* (supra) supports the position of the Commonwealth of Pennsylvania, that his rights under the Fourteenth Amendment were fully protected and same conclusion is warranted under the authority of *Hawk v. Olson* and *Wade v. Mayo*, (supra). Duress in this case is totally lacking, the record shows no inducements to the defendant to plead either guilty or not guilty; no representations were made as to his sentence either as to the place of confinement or length of time he would receive. He does not even allege that he did not know what he was doing or that he did not understand or was misled.

Counsel for the petitioner further cite *Bute v. Illinois*, 333 U. S. 640, 68 S. Ct. 763, which together with *Betts v. Brady*, 316 U. S. 455 as controlling the broad question here involved, viz, that he was deprived of his rights under the "Due Process" clause of the Federal Constitution, Fourteenth Amendment. A reading of those cases, in light of the record of this case clearly establish that he was not. As a matter of fact, those cases fully support the contention that the defendant's

rights were fully protected and that his petition should now be dismissed.

Counsel for the petitioner also places much emphasis upon the expansion of the interpretation of the Fourteenth Amendment in determining the proper scope of its protection for the individual.

What is the practical effect of expanding such interpretation to a mandate to every court of initial jurisdiction that each and every defendant must be represented by counsel, no matter what the offense, felony, misdemeanor or summary offense. In *Com. of Pa. ex rel. McGlinn v. Smith*, 344 Pa. 41, 51, appears the following:

> "If this petition presents a case of 'apparent need for' the 'extraordinary remedy' of habeas corpus, it is reasonable to expect that our courts will soon be flooded with like petitions. In this State during the years 1939-1940 there were in our criminal courts 37,221 pleas of guilty, 10,755 convictions in which a jury trial was waived, and 6,104 convictions after a jury trial. In the same period there were 3,703 defendants sentenced to state prisons or reformatories and 18,449 sentenced to local jails.[4] If even 20% of the defendants who are here annually sentenced to prison were 'without benefit of counsel' and seek their discharge by writs of habeas corpus issuing out of the appellate

[4] This data is from the Chief of the Census Bureau, Department of Commerce.

courts, these two courts will annually have to hear and dispose of 1,107 such cases. Our courts should not for the reasons offered in this petition turn loose upon society the hundreds of convicts who were sent to prison after pleading guilty or being adjudged guilty by a jury, unless the law imperatively requires them to do so, and there is no such requirement."

Since this statistical data was informative, inquiry and study of our annual records has been made. In the Delaware County Court, for the year 1948, there were 1,055 defendants in criminal actions. Of these 833, entered pleas of guilty. Of those pleading guilty, six out of ten that were called for trial, were represented by counsel, either appointed or self retained. For the year 1947, there were 1073 defendants accused of crime, of whom 762 entered their pleas of guilty, of whom approximately 55% were represented by an attorney of their own choosing or were appointed by the court. Except in capital offenses it is not possible to determine whether defense counsel was appointed by the court.

If a clear cut decision is to be made on the representation of council in criminal cases other than capital offenses under state law, the realistic approach can be much better had through the state legislature. Procedural law requirements remotely established under the Fourteenth Amendment should not be so construed that the substance of criminal offenses be lost sight of and attention directed to the form by which it is

remedied. Upon this philosophy what was said in *Com. of Pa. ex rel. McGlinn v. Smith*, supra, is directly in point:

> "The root of the American system of government is found in the principle of duality of sovereignty.[5] The courts have been careful not to disturb the fundamental division of powers between nation and state. Neither nation nor state ever intended that either sovereignty's administration of its criminal laws should be reviewable by the courts of the other sovereignty except in those rare and extraordinary instances when a state criminal court denies a citizen that 'due process of law' guaranteed him by the Fourteenth Amendment. The United States Supreme Court has often declined in criminal cases, no matter how strong an appeal to its sense of justice the petition might make, to take any steps in the direction of 'breaking down the lines which separate the states and of compounding the American people into one common mass', a thing which Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 403, said: 'No political dreamer was ever wild enough to think of.'
>
> "In Knewel v. Egan, 268 U. S. 442, the United States Supreme Court in an opinion by Mr. Justice Stone (now Chief Justice) said: 'It is fundamental

[5] Brougham's "Political Philosophy", 2nd ed (London 1853), Part 3, p. 336.

that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in habeas corpus proceedings' (citing cases). In Frank v. Manguin, 237 U. S. 309, 326, the United States Supreme Court in an opinion by Justice Pitney said : 'If he (the prisoner) is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus * * * As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, id 'due process' in the constitutional sense' (citing cases).

"In Ex parte Tobias Watkins, 28 U. S. 193, 201, Chief Justice Marshall, speaking for the court said: 'The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment * * * The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of habeas corpus? This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner with the cause of commitment. The Court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and reexamine the charges on which it was rendered. A Judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it * * * It would be strange

if, under colour of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

"Recent decision by Federal courts show that they do not regard failure to provide counsel to defendants in criminal cases as a denial of 'due process of law'. In Saylor v. Sanford, Warden, 99 F. 2d 605, 606, supra (1938), it was held by the Fifth Circuit Court of Appeals that the court did not lose jurisdiction when it permitted the accused to be arraigned without assistance of counsel. In the concurring opinion in that case Circuit Judge Sibley said: 'Despite the breath of some of the language of the decision (Johnson v. Zerbst, 304 U. S. 458), the case ought not to be taken as establishing the doctrine that a court has no jurisdiction over an accused person who has no lawyer unless he expressly waives counsel or the court gets him one.' In Sanford, Warden, v. Robbins, 115 F. 2d 435 (1940), the Circuit Court of Appeals of the Fifth Circuit held that defendants who have been convicted without counsel in ordinary cases, though there was no express waiver of counsel, are not held under a void sentence. In that case Circuit Judge

Sibley said: 'Despite some of the language in Johnson v. Zerbst, we do not think it accurate to say that a duly organized court, undominated by mob spirit or any outside force (compare Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969), but proceeding in an orderly way, loses its jurisdiction to try the accused because it rules wrongly upon some question of law, even constitutional law. And we do not think counsel for the accused appointed by the court, where none has been secured by him, is indispensably necessary to the due organization of the court. Without regard to the grade or seriousness of crimes, the Fifth Amendment requires, if a person accused of crime procures counsel, that the court shall permit such counsel to represent and assist the accused, but it does not require the court to furnish counsel.' In that case the United States Supreme Court on March 10, 1941, found 'no ground upon which writ of certiorari should be issued' and denied the petition: 312 U. S. 697, 61 Supreme Court Reporter 737.

"When in the Sacco-Vanzetti case, Justice Holmes of the United States Supreme Court was petitioned for a writ of certiorari, he said: 'This is a case of a crime charged under state law and tried by a State Court. I have absolutely no authority as a Judge of the United States to meddle with it. If the proceedings were void in a legal sense, as when the forms of a trial are gone through

in a Court surrounded and invaded by an infuriated mob ready to lynch prisoner, counsel and jury if there is not a prompt conviction, in such a case no doubt I might issue a habeas corpus, not because I was a Judge of the United States, but simply as anyone having authority to issue the writ might do so, on the ground that a void proceeding was no warrant for the detention of the accused. No one who knows anything of the law would hold that the trial of Sacco and Vanzetti was a void proceeding. They might argue that it was voidable and ought to be set aside by those having power to do it, but until set aside, the proceeding must stand * * * The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene.'

"Later when petitioned for a writ of habeas corpus in the same case, Justice Holmes said: 'I have no authority to issue it unless it appears that the Court had not jurisdiction of the case in a real sense so that no more than the form of a court was there. But I cannot think that prejudice on the part of the presiding judge, however strong, would deprive the Court of jurisdiction, that is of legal power to decide the case, and in my opinion

nothing short of a want of legal power to decide the case authorizes me to interfere in this summary way with the proceedings of the State Court': The Sacco-Vanzetti case, Vol. 5, pp. 5516 and 5532.

"Justice Black of this Court in Passmore Williamson's Case, 26 Pa. 9 (1855), expressed sound views on the issuance of the writ of habeas corpus. That was a case in which the complaint was that petitioner was unjustly held in custody under a commitment of the District Court of the United States and an application was made to the Supreme Court of Pennsylvania for a writ of habeas corpus. Justice Black in refusing the application said: "'There may be cases in which we ought to check usurpation of power by the federal courts. If one of them should presume to take out of our hands a prisoner convicted of contempt in this court, we would resist it by all proper and legal means. What we would not permit them to do against us we will not do against them. We must maintain the rights of the state and its courts; for to them alone can the people look for a competent administration of their domestic concerns; but we will do nothing to impair the constitutional vigour of the general government which is 'the sheet anchor of our peace at home and our safety abroad' * * * It is argued * * * that we cannot refuse the writ without a frightful violation of the petitioner's rights, no matter how

plainly it may appear on his own showing that he is held in custody for a just cause. * * * Can it be possible that the law and the courts are so completely under the control of their natural enemies that every class of offenders against the Union or the state, except traitors and felons, may be brought before us as often as they please, though we know beforehand, by their own admissions, that we cannot help but remand them immediately? If these questions must be answered in the affirmative, then we are compelled, against our will and contrary to our convictions of duty, to wage a constant warfare against the federal tribunals by firing off writs of habeas corpus upon them all the time. The punitive justice of the state would suffer still more seriously. The half of the Western Penitentiary would be before us at Philadelphia, and a similar proportion from Cherry Hill and Moyamensing would attend our sittings at Pittsburgh. To remand them would do very little good; for a new set of writs would bring them all back again. A sentence to solitary confinement would be a sentence that the convict should travel for a limited term up and down the state in company with the officers who might have him in charge. * * *' In his concurring opinion Justice Lowrie said: 'It is an essential element of judicial authority that it must be the judge of its own jurisdiction; and I do not know that this rule is peculiarly applicable to the higher courts. The lowest must

act upon it, subject to the higher social law that is involved in official subordination. Often the question may be erroneously decided. Often such decisions may result in great injury to the citizen, but it is the lot of government to err, because it is human, and a man of well-trained mind will think it no great hardship to submit to authority even in error. In the name of order, the country demands, and has the right to demand it. It is usual to say, even of foreign judgments, that, if pronounced by a competent tribunal, and carried into effect without our assistance, they are conclusive of the questions decided * * * Not that the United States is a foreign country, but that its courts belong to a different system from the state courts, and thus these respective authorities are, as authorities, foreign to each other. Each must respond to its own superiors; neither can call the other officially to account * * * Manufacture and repair constitutions and bills of right as we may; multiply checks and restrictions upon official functions as we may, we cannot shut out human error and its consequences, which are sometimes distressing—while we may carry our suspicions of government so far as to take away its real efficiency as a means of preserving social order; * * * In the name of the order which we represent and enforce, I decline any and every usurpation of power or control over the United States judiciary; it being a system collateral to ours, as complete and efficient

in its organization, and as legitimate and final an authority as any other. I concur in refusing the writ.'

"Every person's security against being deprived by state action, of life, liberty or property, without due process of law is under national protection since the Fourteenth Amendment was adopted on July 21, 1868, yet as Justice Bradley, speaking for the United States Supreme Court in Missouri v. Lewis (1879), 101 U. S. 22, 31, said: 'The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.' Cooley in his edition of Story's 'Commentaries on the Constitution' said: (sec. 1947) 'No more under the Fourteenth Article than previously can the Federal government interfere with the mode prescribed for the trial of State offenses: whatever is established (by the State) will be due process of law, so that it be general and impartial in operation, and disregard no provision of Federal or State constitution.' The state is traditionally the protector of the lives, liberty and property of its own people and the courts of this Commonwealth have ever been vigilant in upholding that 'due

process of law' which 'means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs': Cooley's 'Constitutional Limitations', 8th ed., Vol. 2, p. 741.

"The administration of the criminal laws here as elsewhere is necessarily only an approximation toward that ideal of absolute justice which is said to be unattainable. In the long-established processes of our courts, we believe substantial justice is attained and we find in the record now before us no such impairment of the prisoner's constitutional rights as to require his release.

"The Commonwealth presented evidence of probative value against this accused and he testified freely in his own behalf. The case presented an issue of fact for the jury. Defendant did not ask for the assistance of counsel. With his penitentiary 'background' and his 'experience' in the criminal courts he must have known that professional assistance would have been given him upon request and therefore he must be deemed to have intelligently waived his 'right to be heard by counsel'.

"To discharge from custody this man who has been thrice convicted of felonies, upon the bare technicality that the trial judge did not inquire

whether he wished to have counsel assigned him would justify the reproach which William Howard Taft (later Chief Justice of the United States) expressed on June 26, 1905, as follows: 'When a court of highest authority interposes a bare technicality between a defendant and his just conviction,' it is not too much to charge some of the laxity in our administation of the criminal law to a proneness on the part of courts of last resort to find error and to reverse judgments of conviction.

"The writ is refused."

QUESTION

Q. Did this defendant receive a fair trial?

A. In reading the brief of the petitioner much stress is laid upon the remarks of the Court at the time sentence was imposed and several remarks made by the Court during the course of the trial. Upon these isolated instances he undertakes to erect a structure far beyond the importance of what the record discloses.

The petitioner's counsel has also expounded at great length the philosophy underlining the interpretation and operation of the Fourteenth Amendment. It would appear that tremendous labor has been spent in interpreting "due process" clause of the Fourteenth Amendment. Labored exposition of this clause, consisting of many thousands of words, has not added much by the way of guidance in its applicaton in every day administration of law. As a philosophy of "due process" clause is understood it only requires fair play, a deliberate action of a tribunal and its officers in an unprejudiced atmosphere giving due consideration of physical and mental limitations of all parties involved, a freedom from duress or beguiling practices. It is intended that only an honest search for truth be made; evidence adduced should be germane to the issue, properly acquired, and presented in an orderly manner so that well intentioned, honest and trained men can

properly safeguard human personal rights and rights of property. A cold typewritten record of a Court Stenographer setting forth the proceedings in a Court is far short of a true reflection of any trial and particularly a criminal trial. The demeanor of the Court, psychological atmosphere of the jury, the educational background of the jurors, the attitude of the District Attorney and innumerable other features of the proceeding taken together only, gives a true picture.

No law is self executing and in the final analysis the administration of a criminal law depends in a great measure upon the type of men who have the responsibility of its execution. The record in this case falls far short of giving a complete picture of what transpired or all the facts bearing upon the case. The accused and the prosecutor are both members of the negro race. They were of approximate equal intelligence and in the same walk of life. There was a theft by one of the approximate value of fifty dollars. The petitioner was found with the goods by the prosecutor, some in his own possession, some in a pawn shop, pawned by the accused under an assumed name, and the balance in the jail cell which had been occupied by the accused alone. This evidence was corroborated by the officers and in a measure by the prosecutor's mother. All of the facts were established within twenty-four hours, the theft, apprehension and finding of the accused with part of the goods then in his possession. That was the substance of the case. It appears in the trial record. The parties testifying did so to the best

of their ability to express themselves and no genius was required to understand these facts. The jury deliberated not more than ten minutes and the entire case consumed less than three quarters of an hour of time. It is recognized that a number of these facts are not of record.

From the entire record the following are exclusive of the Charge of the Court and the only remarks made by the Judge:

Mr. Johnson: He can't testify now. He is just supposed to ask questions.

The Court: You can not testify yet. Later you can testify. Ask your questions now.

The Defendant: This all leads up to it.

The Court: You are only asking questions now. You may later take the stand and testify. If you do, your will open up to the district attorney the right to ask questions about certain things.

The Defendant: Yes, sir.

The Court: You may ask any questions you care to on cross-examination on what the district attorney has asked.

The Defendant: That is al lif he didn't ask the man about the two of ous being in there.

* * * * * * *

The Court: Now the, Gibbs, you may, if you want to take the stand and say anything you want

to say, but I warn you if you do, if your have any record of any prior conviction, any felonies or any misdemeanors in the nature of what we call crimen falsi, the commonwealth may offer the record of any convictions you may have had. I am warning you in advance. You may, however, take the stand and testify or you may refuse to take the stand, the commonwealth and the court may not comment unfavorably about your failure to take the stand and testify. I want to warn you fully before you do take the stand.

Do you want to take the stand?

The Defendant: No, I don't have anything to say in Court.

The Court: Do you have any witnesses you want to put on the stand?

The Defendant: No, sir.

The Court: Do you wish to argue it to the jury? You may, if you want to.

The Defendant: No, sir; I don't believe so. I am not educated to talk to the people.

The Court: Do you waive your speech?

Mr. Johnson: I think I should make a few remarks to the jury.

What was done by the presiding Judge was for the purpose of helping the defendant and suggest to him that he should not make certain mistakes but there was

no interference, brow beating, inconsideration, or intemperate attitude displayed by the Court at any time.

True it is that there did creep into the record a certain amount of hearsay testimony but not one iota was prejudicial to the defendant in any degree. It will take far less time to read the entire record of the case than to read the petitioner's brief. The petitioner's counsel undertakes to stigmatize in his brief from a cold record, a judge who was hostile and lacking in fair mindedness and even going so far as to indicate a failure to do his duty. Such a conclusion is unwarranted by the facts of the case and the basis on which such contention rests is wholly wanting. The trial of this case proceeded in a very quiet, dignified manner, and in the friendliest of atmosphere. The trial Judge undertook to help the defendant during the course of his trial as much as he could with propriety without becoming a participant. There was nothing in the course of the conduct of the trial which could even faintly reflect that Judge Erwin was not fair minded in the matter. Of course, when the trial Judge came to the sentencing of the defendant he knew of his prior criminal record of six felonies within this jurisdiction. At the time of sentence the Court had before it a person who had been convicted of six felonies and was before it on the seventh felony charge and no doubt his remarks should be construed as an effort to induce the defendant to cease his criminal career. That does not convict the Judge of prejudice or facetious conduct. There comes a time in the practical administration of the law the Judges should undertake to impress upon habitual criminals that the law is not

entirely helpless and may take further steps against them. From one who actively participated in the trial as District Attorney, to read the remarks set forth in the petitioner's brief as characterizing the Judge's attitude in the case as one of consistent hostility is about as far from the truth of the case as it could be. Counsel's statement of prejudice unsupported by more than what has been cited in the record does not establish the fact nor the truth of the statement. It is submitted that something more than this should be present before a Court of initial jurisdiction is stigmatized as guilty of unlawful conduct.

The case of *Commonwealth ex rel. Townsend v. Burke*, 361 Pa. 35 (1949), has also been referred to as authority by the petitioner's counsel, to support the contention that the defendant's rights under the Fourteenth Amendment were violated. In the opinion dated January 11, 1949, the Supreme Court of the Commonwealth of Pennsylvania interpreted the decision of the Supreme Court of the United States. In that interpretation the Court said:

> "We are now unanimously of the opinion that the decision of the Supreme Court means, and was intended to mean, that the conduct of the trial judge in connection with his sentencing of the defendant, Townsend, constituted error of such a fundamentally harmful nature (considering the uncounseled position of the defendant) as to stigmatize the proceeding as lacking constitutional due process throughout and render it vitiated ab initio."

We will, therefore, revoke our order of May 26, 1947, denying the relator's petition for habeas corpus, and direct that the proceedings had in the Court of Oyer and Terminer of Philadelphia on June 5, 1945, with respect to the defendant, Townsend, be, in their entirety (including, specifically, the defendant's pleas and the sentences), vacated and set aside.

"That our conclusion to such effect fairly comports with the decision of the Supreme Court seems manifest. The fact that the defendant was without counsel did not, ipso facto, render the proceeding wanting in due process. The opinion for the Supreme Court in this very case expressly recognizes that this court has frequently held that the provision in our State Constitution, according defendants the right to be heard by counsel, does not require court assignment of counsel to defendants in non-capital cases who are without counsel: see e.g., Commonwealth ex rel. Withers v. Ashe, 350 Pa. 493, 39 A. 2d 610, and Commonwealth ex rel. McGlinn v. Smith, 344 Pa. 41, 24 A. 2d 1. Court assignment of counsel in Pennsylvania to destitute defendants in capital cases is provided for by statute: Act of March 22, 1907, P. L. 31; 19 PS § 784. As further pointed out in the opinion for the Supreme Court in this case, that court but recently reaffirmed that "the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital

case from an uncounseled defendant. (Citing) Bute v. Illinois, 333 U.S. 640.

"What invalidated the proceeding in the instant case was the *improper conduct of the trial judge which consisted of his making facetious remarks, concerning the defendant's prospective penal servitude, in connection with the imposing of sentence, and of reading from a list containing five separate criminal charges against the defendant at former times when, actually, in three out of the five cited instances the charges had either been dismissed by the magistrate or the accused had been found not guilty.* The situation, thus judicially created, was pointedly appraised by Mr. Justice Jackson, speaking for the Supreme Court, in the following language: *'The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court did not in-*

fluence the sentence which the prisoner is now serving.

"We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction (i.e., on the defendant's pleas) cannot stand.' (Emphasis supplied.)

"The fatal impairment of the proceedings of June 5, 1945, although not injected until the trial court began to sentence the defendant, was, in legal contemplation under the circumstances present, the result of the defendant's being without counsel; and the consequent disregard of the defendant's constitutional rights, so occurring, cannot be disjointed from the proceedings as a whole, including the court's acceptance of the defendant's contemporaneous pleas of guilty. For, once the lack of counsel became a denial of due process in the circumstances,

> the particular constitutional deficiency could not be lopped off and allocated to but one portion of the proceeding. Like a blood stream infection, which permeates the whole body, the harmful condition cannot be isolated to what appears to have been the incipient focal point of infection. There is the same reason, therefore, to set aside the defendant's pleas of guilty as there is to vacate the sentence. The convictions, even based on ostensibly voluntary pleas of guilty, cannot stand any more than can the sentence. Accordingly, the matter is not merely one of remanding the relator to the court below for sentencing".

The facts of that case are entirely different from the instant case. There was no facetiousness indulged in the instant case by the Court at any time and the record is devoid of anything which would remotely indicate such was the fact.

The record in this case consists of twenty-one and a half pages of double space typewritten matter. The balance of the record contains the Charge of the Court and the sentencing of the defendant, the entire record consisting of thirty-five pages.

The Court did not at any time prior to the return of the conviction of the defendant by the Jury indulge in any conduct or make any remarks which could be construed as facetious. What he did was to undertake to help the defendant prevent him from making mistakes in the conduct of his own trial. In this respect the

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complain about his counsel's inability to obtain the desired result, namely an acquittal of the offense committed through the channel of habeas corpus and allegations of his being deprived of his rights under "Due Process".

CONCLUSION

Under the foregoing authorities it is submitted that the application of the petitioner be denied.

Respectfully submitted,

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